No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

PETITIONERS,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE DONALD CLARKE AND NICHOLAS CALCINA HOWSON IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI[1]

Amicus curiae Donald Clarke is Professor of Law and David A. Weaver Research Professor of Law at the George Washington University Law School. His academic specialization is in the law and legal institutions of the People's Republic of China. He is a member of the Executive Editorial Board of the *American Journal of Comparative Law* and of the Editorial Boards of the *China Quarterly* and the *Journal of Comparative Law*. He has served as an expert witness in Chinese law matters before federal courts and administrative agencies as well as in state courts and international litigation and arbitration proceedings. He has also served as a consultant on Chinese law matters to a number of organizations, including the Financial Sector Reform and Strengthening Initiative (FIRST), the Asian Development Bank, and the Agency for International Development. He is a member of the Council on Foreign Relations.

Amicus curiae Nicholas Calcina Howson is Professor of Law at the University of Michigan Law School, and a former partner of Paul, Weiss, Rifkind, Wharton & Garrison LLP who practiced in New York, London, Paris, and Beijing, China, finishing his practice career as one of the managing partners of that firm's Asia Practice based in Beijing. His academic specialization is in

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[1] The parties to the case have consented in writing to the filing of this brief. No party other than *amici* and their counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

Chinese law and legal institutions, with a focus on China's corporate law and securities regulation, and private and public enforcement of corporate and securities law norms in the Chinese courts or by Chinese administrative agencies. He has served as a consultant on Chinese law matters for a number of U.S. and international institutions and served as an expert witness on Chinese law matters in U.S. federal court litigation, U.S. agency enforcement proceedings, international and Chinese arbitrations, and in litigation before the Beijing Higher People's Court. He has just concluded service as the only non-Chinese citizen member of the Asian Development Bank-funded expert group advising the Chinese legislature on wholesale amendment of the 2006 Securities Law of China. Professor Howson is also a member of the Council on Foreign Relations.

Amici have academic expertise and a strong interest in the proper interaction of the United States legal system with the Chinese legal system.

SUMMARY OF ARGUMENT

The Second Circuit has held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016). This rule of conclusive deference should be rejected because it requires courts to ignore

reality and to sacrifice the search for truth and accuracy in adjudication to other, lesser values.

That a foreign legal system is complex strengthens rather than weakens the case for an inquiry into foreign law that takes into account a wide range of sources as opposed to a single source.

Conclusive deference to a foreign government's statements is particularly inappropriate when there is reason to believe that the foreign government has an interest in the case akin to that of a party. In this case, the District Court found facts strongly suggestive of the partiality of China's Ministry of Commerce (the "Ministry" or "MOFCOM"), the entity that submitted the statements in question. Yet the Second Circuit's rule would foreclose any inquiry that would uncover such facts.

A rule of conclusive deference also renders irrelevant the critical fact that, as in this case, a foreign government has made contradictory statements on the point at issue. To hold that courts must simply accept a government's most recent statement, or the statement submitted in the litigation before them, is an impermissible abdication of the responsibility of courts to determine the content of foreign law with accuracy.

The problem of contradiction is compounded by the fact that MOFCOM's assertion that it has "unquestioned authority to interpret applicable Chinese law" is a mere *ipse dixit* accompanied by no authority or argument. In

fact, MOFCOM is a mere ministry within the Chinese central government and, like other ministries, may not make rules that contravene higher-level norms, such as statutes. Not only does MOFCOM have no authority to interpret statutes, but Chinese law is clear that ministries may not be the final arbiters of the validity of their own rules within the Chinese legal system. Asserting that its authority to interpret law is unquestioned does not make it so.

This case involves the interaction of two legal systems. The key question in this case is whether a "true conflict" existed between the laws of China and the United States such that "compliance with the laws of both countries [was] . . . impossible[.]" *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–99 (1993). To be sure, a court should attempt to "reconcile[] the central concerns of both sets of laws." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 555 (1987). But it must in the end do so itself, and cannot uncritically delegate any part of this task to a foreign government.

Finally, conclusive deference is not required by considerations of deference to the foreign policy powers of the executive branch. The executive branch has already made its position clear in this case: it desires courts to make determinations of foreign law without granting conclusive deference to the expressed views of foreign governments. *See* Brief for the United States as Amicus Curiae, *Animal Science Products, Inc. v. Hebei Welcome*

Pharm. Co., 86 U.S.L.W. 3351 (2018) (No. 16-1220).

ARGUMENT

I. The Complexity of a Foreign Legal System Strengthens Rather than Weakens the Case Against Conclusive Deference

Federal Rule of Civil Procedure 44.1 ("Rule 44.1") states that the determination of foreign law is a question of law for the court and not a question of fact for the jury. *See* Fed. R. Civ. P. 44.1. The court may consider "any relevant material or source[.]" *Id.* In sum,

> Rule 44.1 reflects a judgment that courts should have "maximum flexibility about the material to be considered and the methodology to be employed in determining foreign law in a particular case." Courts rely on a variety of materials, including "[s]tatutes, administrative material, and judicial decisions"; "expert testimony" interpreting those primary sources; and "any other information" that may be probative.

Brief for the United States as Amicus Curiae at 7, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, 86 U.S.L.W. 3351 (2018) (No. 16-1220) (internal citations omitted).

Respondents have argued, and the Second Circuit agrees, *see In re Vitamin C Antitrust Litig.*, 837 F.3d at 190–91, that Chinese law is complicated and often ambiguous. In the words of

the Respondents' expert in the District Court proceedings, Professor Shen Sibao:

> Many official requirements are . . . transmitted through communications that may consist of department documents or oral directions, even including telephone calls. It is not the form of communication that creates its binding character, but the source and authority of the party giving the direction.

Defs.' Decl. Supp. Summ. J. Ex. 4, at 5, *In re Vitamin C Antitrust Litig.*, No. 1:06-md-01738-BMC-JO (E.D.N.Y. Nov. 23, 2009), ECF No. 394-2.

But this strengthens rather than weakens the case for a realistic inquiry by the trial court instead of unthinking deference to an official statement. Far from assuming that the Chinese legal system was similar to that of the United States, the District Court took explicit notice of its difference:

> At the outset, I am compelled to note that the Chinese law and regulatory regime that defendants rely on is something of a departure from the concept of "law" as we know it in this country—that is, a published series of specific conduct-dictating prohibitions or compulsions with an identified sanctions system. To give but one example, the regulatory system governing vitamin C not only relies on consensus-based decision making, but also accords defendants wide, and possibly unbounded, discretion in setting the price

> and output levels for vitamin C. In addition, defendants' own expert asserts that oral directives are an important component of Chinese regulatory law and admits that "Chinese governmental control is a quite different process from what takes place in other countries." Of course, foreign legal regimes that are markedly different from our own can still, in their own unique ways, compel a defendant's conduct. However, in some circumstances, asserting a claim of compulsion under a foreign regime that so differs from our own concept of law can be akin to trying to fit a round peg into a square hole.

In re Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 550 (E.D.N.Y. 2011).

In such circumstances, it is entirely proper for a court to consider the views of a foreign government, which may offer valuable insights into the reality of a regulatory regime that diverges from its apparent form on paper. But it is equally proper for a court to take evidence from other parties as to what that reality was, especially when the government in question has demonstrated an intense interest in the outcome of the litigation, *see infra* Part II, and has made contradictory statements in the past, *see infra* Part III.

II. Conclusive Deference Is Inappropriate When a Government Has or May Have a Party-Like Interest in the Case

Conclusive deference to a foreign government's interpretation of the foreign state's law is inappropriate where, as here, the foreign government has or may have an interest in the litigation akin to that of a party. This raises the possibility that the government's characterization of its own law could be opportunistic and not neutral, and hence calls for further investigation, not blind deference.

The Chinese government is not a neutral observer of this case. Respondent North China Pharmaceutical Group Corp. ("North China Group") is an entity indirectly owned by the State-Owned Assets Supervision and Administration Commission of Hebei Province, China and deemed under the Chinese system to be a state-owned enterprise. *See* Brief in Opposition at iii, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, 86 U.S.L.W. 3351 (2018) (No. 16-1220). Respondent Hebei Welcome Pharmaceutical Co. Ltd. ("Hebei Welcome") is a subsidiary of North China Pharmaceutical Co. Ltd. ("North China"). *See id.* While the record does not appear to show the relationship between North China and North China Group, a page at the website of North China Group asserted that North China was, as its name suggests, a subsidiary. N. China Pharm. Grp. Corp., *Company Profile*, https://web.archive.org/web/20140922190940/http://www.ncpc.com:80/en/Profile_Organization.asp

(archived Sept. 22, 2014) [https://perma.cc/8SC7-TK7N]. This would make Hebei Welcome an indirectly-owned state-owned enterprise as well.

Given that one and likely both of the Respondents are at least majority-owned by the Chinese state, the state has a direct interest in their economic welfare. Even if they were not state-owned enterprises, however, the Chinese state would still be intensely interested in their economic health. Although China has undertaken significant and meaningful reforms of its economy and industrial structure in the post-Mao era, the government's outlook remains essentially mercantilist and dirigiste. *See* Barry Naughton, *A Tarnished Triumph*, 21 China Econ. Q., Dec. 2017, at 21, 25.[2] The state makes no secret of its intention to pursue "mercantilist industrial policies designed to promote, guide and support domestic industries[.]" Office of the U.S. Trade Rep., *2017 Report to Congress on China's WTO Compliance* 6 (Jan. 2018). And "China's state-dominated financial system and the lack of rule of law means that state involvement can be pervasive, even if a firm is nominally privately owned." *Chinese Investment in the United States: Impacts and Issues for Policymakers: Hearing Before the U.S.-China Econ. & Sec. Review Comm'n*, 115th Cong. 13 (2017) (statement of Thilo Hanemann, Director and Economist, Rhodium Group).

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[2] Naughton is the Sokwanlok Chair of Chinese International Affairs at the Graduate School of International Relations and Pacific Studies at the University of California, San Diego and a leading expert on the Chinese economy.

Courts should not be required as a matter of law to ignore the possibility that a mercantilist government such as China's, when dealing with a direct contest between a local firm and a foreign firm or government, is going to view siding with its nationals as a policy imperative. To say that a government may side with its nationals is not insulting to that government; it is simply the common-sense acknowledgement of a well-known reality. As noted in a recent study of foreign states' *amicus curiae* submissions,

> some foreign nations' amicus curiae submissions may be, in essence, mercantilist. They may be motivated directly by the interests of defendants. The amicus briefs may be submitted in order to shield the foreign defendants from liability in the U.S., even if their conduct was anticompetitive. From a pragmatic perspective, fines or damages in a transnational context represent a transfer of wealth from home to a foreign jurisdiction and therefore should be avoided.

Marek Martyniszyn, *Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases*, 61 Antitrust Bull. 611, 630 (2016).

The partiality of the Ministry in this case is set forth extensively by the District Court in its Memorandum Decision and Order of Oct. 1, 2012, in which it found that "[t]he circumstances of this litigation provide ample . . . reasons to conclude that [the Ministry's statements respecting

Chinese law] are not trustworthy" and "there is no dispute that the Ministry is not impartial in this litigation." *In re Vitamin C Antitrust Litig.*, Nos. 06-MD-1738 (BMC) (JO), 2012 WL 4511308, at *3 (E.D.N.Y. Oct. 1, 2012). Indeed, the District Court found that a Ministry statement "does not read like a frank and straightforward explanation of Chinese law" but instead "reads like a carefully crafted and phrased litigation position." *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 552 (denying motion for summary judgment). Courts should of course take litigation positions into account, but should not grant them conclusive deference.

III. MOFCOM's Attempt to Explain Away Inconsistent Statements at WTO Fails

The strongest case against conclusive deference arises when the foreign government, as in this case, has made contradictory statements about its law at different times and in different fora. A rule of conclusive deference to a foreign government's representations does not resolve the question of *which* representation the court should defer to. The position of the Ministry is essentially, "Never mind what we said before; you must accept what we say *now*." This position not only violates the practical spirit of Rule 44.1, but is also contrary to established U.S. law. When a foreign government makes conflicting statements, a court is not bound to accept its most recent statement or the one offered in litigation. *See United States. v. McNab*, 331 F.3d 1228, 1242 (11th Cir. 2003).

That MOFCOM has made conflicting statements is clear; its attempt to explain away the inconsistency fails.

As discussed in the District Court's original judgment denying the defendants' motion to grant summary judgment in their favor, MOFCOM, speaking through China's Permanent Mission to the World Trade Organization (the "WTO"), had stated in WTO proceedings that it did not exercise any control over vitamin C export pricing or volume.[3] *See In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d at 532. In 2002, MOFCOM formally represented to the WTO that "[f]rom 1 January 2002, *China gave up export administration of . . . vitamin C*[.]" Council for Trade in Goods, *Transitional Review Under Article 18 of the Protocol of Accession of the People's Republic of China*, WTO Doc. G/C/W/438, at 3 (Nov. 20, 2002) (emphasis added). It then noted that there were 54 products still subject to export administration and that a list of such products and the relevant measures had been provided to the WTO. *See id.* The same statement appears in the Statement by the Head of the Chinese Delegation issued nine days later. *See* Council for Trade in Goods, *Statement by Head of the Chinese Delegation on the Transitional Review of China by the Council for Trade in Goods*, WTO Doc. G/C/W/441, at 3 (Nov. 29, 2002).

In a 2004 submission to the United States Department of Commerce in support of China's

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[3] As the Permanent Mission to the WTO is under MOFCOM, it is appropriate to attribute its statements to MOFCOM.

request to be granted market economy status under U.S. trade law, MOFCOM stated, in a *section entitled "The extent of government control* over the allocation of resources and over the price *and output decisions of enterprises," that with a* small number of exceptions, Chinese enterprises *"make their price and output decisions based on* market considerations." Ministry of Commerce of *China, Comment Letter on U.S.-China Joint* Commission on Commerce and Trade Working *Group on Structural Issues, at 8 (May 19, 2004),* https://enforcement.trade.gov/download/us-china-*jcctwg/comments/mcprc-jcctwg-cmt.pdf. According* to the submission, the exceptions were in "a very *limited number of products and services, which* are either of strategic significance or of particular *importance to the public welfare." Id. In none of* the filings of MOFCOM or the Respondents has it *been contended that the vitamin C industry is of* strategic significance to the Chinese state or of *particular importance to the public welfare of* China.

MOFCOM's attempts to explain away these statements are unconvincing. In its August 31, *2009 Statement to the District Court, MOFCOM* correctly noted that "*general descriptions* of the *current status of China's market economy [cited* by one of the plaintiffs' experts] . . . should not be *deemed as explicit or implicit statements of* China's abandonment of its limited regulatory *policies over certain designated industries* including the vitamin C industry[.]" Defs.' Decl. *Supp. Summ. J. Ex. 1, at 3, In re Vitamin C* Antitrust Litig., No. 1:06-md-01738-BMC-JO

(E.D.N.Y. Nov. 23, 2009), ECF No. 399-2. But this argument does nothing to explain away what *is* an explicit statement: the 2002 claim noted above that China "gave up export administration of . . . vitamin C."

MOFCOM's subsequent attempt to do *better in its amicus brief to the Second Circuit* fails as well. In that brief, it called attention to *the fact that the 2002 statement about giving up* export administration came in a section headed, *"Restrictions on exports through non-automatic* licensing," and asserted that this therefore means *that China was not declaring it had given up all* forms of export restrictions over vitamin C. *See Brief for Amicus Curiae Ministry of Commerce of* China in Support of Defendants-Appellants at 27, *In re Vitamin C Antitrust Litig.*, No. 13-4791, (2d Cir. Apr. 14, 2014), ECF No. 105. This argument *is, as will be shown below, frail to the point of* being disingenuous.

First, and most incredibly, *MOFCOM's amicus* brief omitted three important words that *follow the quoted language in the heading: "or other means."* Thus, the statement that China had *given up export administration of vitamin C* appeared in a section entitled, "*Any* restrictions on *exports through non-automatic licensing or other means* justified by specific product under the WTO *Agreement or the Protocol."*[4] *Council for Trade in*

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[4] The Protocol refers to China's Protocol of Accession, *i.e.*, the specific agreement under which China joined the WTO. The language "justified by specific product . . ." refers to China's obligation to provide a product-specific justification

Goods, *Transitional Review Under Article 18 of the Protocol of Accession of the People's Republic of China*, WTO Doc. G/C/W/438, at 2 (Nov. 20, 2002) (emphasis added). China's statement about vitamin C was an affirmative declaration that it had no measures that would count as "any restrictions . . . through non-automatic licensing or other means."

Second, MOFCOM's argument fails even without the "or other means" language. Automatic licensing refers to licenses designed to *monitor* exports, not regulate them; in non-automatic licensing systems, by contrast, certain conditions must be met before a license is issued.[5] Non-automatic licensing is precisely the kind of regime that MOFCOM now claims existed over vitamin C exports: manufacturers would be allowed to export only if their sales contracts had been approved under the "verification and chop" system. *See* Brief for Amicus Curiae Ministry of Commerce of China in Support of Defendants-Appellants at 5, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105.

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for any such restrictions.

[5] The distinction in the case of import licenses is explained at the website of the Office of the United States Trade Representative. *See* Office of the U.S. Trade Representative, *Import Licensing*, https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/import-licensing. Although this case is about export licenses, the distinction between automatic and non-automatic, and their meaning, is the same.

Finally, a further inconsistency in MOFCOM's position is worth noting. In Section 8 of China's Protocol of Accession to the WTO, the Chinese government agreed to publish in an official journal

> by product, the list of all organizations, *including those organizations delegated such authority by the national authorities*, that are responsible for authorizing or approving imports or exports, whether through grant of licence or other approval; [and] procedures and criteria for obtaining such import or export licences or other approvals, and the conditions for deciding whether they should be granted[.]

Protocol on the Accession of the People's Republic of China, § 8(1)(a), WTO Doc. WT/L/432 (Nov. 23, 2001) (emphasis added).

Had such a notice ever been published, it would have been in the interest of MOFCOM and the Respondents to mention it at some point in these proceedings. That they have not done so strongly suggests that China in fact never published any notification stating that MOFCOM or any trade association acting by delegated authority[6] exercised any control over exports of vitamin C.

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[6] According to MOFCOM's statements in this case, that would be the Chamber of Commerce of Medicine and Health Products Importers & Exporters. *See* Brief for Amicus Curiae Ministry of Commerce of China in Support of Defendants-Appellants at 4, *In re Vitamin C Antitrust Litig.*,

The unfortunate conclusion is inescapable: MOFCOM's representations (both affirmative and negative) to the WTO on the one hand and to the courts of the United States in this case on the other cannot both be accurate. In such circumstances, the courts have no choice but to undertake their own inquiry as best they can.

IV. MOFCOM Does Not Have "Unquestioned Authority" to Interpret Applicable Chinese Law

In its *amicus* brief to the Second Circuit, MOFCOM declared that it had "unquestioned authority to interpret applicable Chinese law." Brief for Amicus Curiae Ministry of Commerce of China in Support of Defendants-Appellants at 14, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105. Yet it cited no authority in support of this claim. From MOFCOM's standpoint, this is understandable: it is making an assertion about Chinese law, and to provide reasons and authorities for its assertions about Chinese law is precisely what MOFCOM argues strenuously it must not be required to do. The difficulty this poses for the Second Circuit's rule of conclusive deference, however, is obvious: if conclusive deference is granted to a government

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No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105; Brief of Amicus Curiae the Ministry of Commerce of China in Support of the Defendants' Motion to Dismiss the Complaint at 7–8, *In re Vitamin C Antitrust Litig.*, No. 06-mdl-1738 (DGT) (E.D.N.Y. June 29, 2006), ECF No. 30-1.

body's assertion of its own authority, then any government body at any level can bootstrap its authority merely by claiming that such authority exists. Modern governments are complex entities, with different branches, levels, and departments often functionally independent of each other. The Second Circuit's rule opens the door to a cacophony of different interpretations, each of which must be treated as accurate with conclusive and unquestioning deference. A rule that deprives courts of the ability to examine a claim of authority cannot advance the interests of comity or justice.

Furthermore, MOFCOM's sweeping claim to "unquestioned authority to interpret applicable Chinese law" is simply inaccurate.

The authority to interpret Chinese statutory law (*falü*) is granted by China's Law on Legislation to the National People's Congress or its Standing Committee. *See* Lifa Fa (立法法) [Law on Legislation] (as amended, promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015), art. 45, http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm [https://perma.cc/PVK9-9GJ6] [hereinafter Law on Legislation]. MOFCOM has no power under Chinese law to issue authoritative interpretations of statutory law.

This case does not, however, involve statutory law; it involves instead MOFCOM's claims about the content and import of MOFCOM's own ministry-level rules. The Chinese term for such rules, *bumen guizhang*, is often translated as "departmental rules." According to the Law on Legislation, departmental rules shall be for the implementation of matters covered by statutory law or various regulatory documents (the terms in question can be translated as administrative regulations (*xingzheng fagui*), decisions (*jueding*), and orders (*mingling*)) issued by China's State Council, a body superior to MOFCOM. *See id.*, art. 80. Where they do not serve the purpose of implementing such statutory law or State Council documents, departmental rules may not impair the rights or increase the duties of citizens, legal entities such as corporations, or other organizations. *See id.* In no circumstances may departmental regulations contravene superior norms such as statutory law or State Council administrative regulations. *See id.*, arts. 87, 88.

To summarize the above, MOFCOM might well issue rules in the realm of foreign trade that purport to bind exporters such as the Respondents, but whether they actually do so under Chinese law is not a simple matter. Its rules might be infirm or invalid for a number of reasons: they might impair rights or increase duties (as a mandatory price floor surely does) while not serving the purpose of implementing

statutory law or State Council administrative regulations, or they might simply contravene the provisions of superior norms. Its rules might require producers to violate a superior norm—China's Antimonopoly Law, for example—and would for that reason be invalid.[7] In no case does

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[7] For example, China's Antimonopoly Law (the "AML") prohibits agreements to fix prices or limit the quantity of goods sold—precisely the kind of agreements at issue in this case. *See* Fan Longduan Fa (反垄断法) [Antimonopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 13, http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm [https://perma.cc/6MGH-KBVF]. Article 36 of the AML forbids government administrative authorities—a term that includes MOFCOM—from abusing their authority by compelling producers to engage in activities forbidden by the Antimonopoly Law. *See id.*, art. 36. Article 37 prohibits government administrative authorities from abusing their authority by making rules that eliminate or restrict competition. *See id.*, art. 37. China's National Development and Reform Commission, a ministry-level body independent of MOFCOM, is responsible for enforcing the rules of the Antimonopoly Law relating to price cartels. *See* Wendy Ng, *The Independence of Chinese Competition Agencies and the Impact on Competition Enforcement in China*, 4 J. Antitrust Enforcement 188, 190 (2016). In the past, the NDRC has brought actions against domestic price cartels organized by trade associations, *see* Qian Hao, *Overview of the Administrative Enforcement of China's Competition Law*, *in* Procedural Rights in Competition Law in the EU and China 39, 50 (Caroline Cauffman & Qian Hao eds., 2016) ("[M]ost of the major price monopolies handled by both the NDRC and its local counterparts have been cartels arranged by trade associations."), but the source does not state whether any of the cartels purported to operate under the compulsion of another Chinese government authority.

Chinese law permit MOFCOM to be the final arbiter of the compliance of its own rules with the principles set forth in the Law on Legislation.

Finally, it is worth noting that the system of "verification and chop" described by MOFCOM in its amicus brief to the Second Circuit required the cooperation of China's General Administration of Customs ("Customs"). *Yet MOFCOM has no power to require Customs, also of full ministry rank in China's administrative structure,*[8] *to follow its orders. See* Susan V. Lawrence & Michael F. Martin, Cong. Research Serv., R41007, *Understanding China's Political System* 15 (2013), https://fas.org/sgp/crs/row/R41007.pdf ("[E]ntities of equivalent rank cannot issue binding orders to each other."). Just as MOFCOM cannot require the National Development and Reform Commission to overlook a MOFCOM-sponsored price cartel (should the former wish to break it up),[9] so it cannot force Customs to deny export permission to disfavored companies. In each case, the matter will be settled by bargaining, not law. *See* Kenneth Lieberthal, *Governing China* 189-92 (2d ed. 2004).

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[8] Customs is formally a "general administration" and as such has the same rank as a ministry such as MOFCOM. *See* Susan V. Lawrence & Michael F. Martin, Cong. Research Serv., R41007, *Understanding China's Political System* 16, Table 2 (2013), https://fas.org/sgp/crs/row/R41007.pdf.

[9] The authority of the National Development and Reform Commission in antimonopoly enforcement is discussed in footnote 7, *supra*.

None of this is to deny that it would be a daunting task for an American court to determine if MOFCOM's rules would for some reason be deemed invalid under Chinese law by a competent Chinese authority, and this brief does not purport to make such a determination in this case. What it argues instead is simply that it is entirely possible for MOFCOM's rules to be invalid within the Chinese legal system, just as it is possible for a U.S. government department or administrative agency's rules to be found invalid within the U.S. legal system. MOFCOM does not have the authority within the Chinese legal system to decide on the validity of its own measures; still less does it have "unquestioned authority to interpret applicable Chinese law."

While it is not surprising that MOFCOM's *amicus* briefs and other submissions in this case express no doubt as to the validity of MOFCOM's actions within the Chinese legal system, the fact is that they make a difficult and complex problem appear simple and straightforward. Thus, conclusive deference to MOFCOM's views is inappropriate.

V. Courts Should Not Delegate to Foreign Governments the Power to Decide the Meaning of United States Legal Terms

The key question in this case is whether a "true conflict" existed between the laws of China and the United States such that "compliance with the laws of both countries [was]. . . impossible[.]" *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,

797–99 (1993). The concern animating the "true conflict" question is one of comity:

> When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.

Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 555 (1987) (footnote omitted).

What must be reconciled are the central concerns of *both sets of laws*: those of the United States and those of the foreign state—in this case, China. And whether there is indeed a true conflict in the sense of *Aérospatiale* and *Hartford Fire*—decisions of American courts, not foreign courts, using terms intended to be meaningful in American law—can be determined only by an examination of both sets of laws *by American courts* with a view to effectuating the values and policies embodied in such terms.

The Second Circuit impermissibly delegated this task to MOFCOM, allowing it to determine unilaterally and conclusively whether a true conflict existed, even though the Ministry of Commerce has no expertise in U.S. antitrust law or the values and policies expressed in the case law interpreting terms such as "true conflict," and even though it is not the job of China's Ministry of

Commerce—as it assuredly *is* the job of American courts—to promote those values and policies.

To be sure, American courts by the same token do not have expertise on foreign law. But somebody must decide these questions, and they are the body that has been given the constitutional and statutory authority to do so. They can decide whether a true conflict exists with foreign law in the same way that they decide other questions on which they lack expertise: by taking testimony and examining evidence. That process should certainly include listening to the views of the relevant foreign government, but it should not exclude all other kinds of evidence that might be relevant (including, as in this case, evidence that the foreign government in question made contradictory statements in the past).

VI. Conclusive Deference Is Unreasonable and Not Required by Considerations of Deference to the Foreign Policy Powers of the Executive Branch

The position of MOFCOM is clear: not just substantial deference, but conclusive obedience to its wishes is what American courts must display: "When a foreign sovereign appears in such a case to say what it demanded of a defendant, it should not be open to a district court to deny the command was given." Brief for Amicus Curiae Ministry of Commerce of China in Support of Defendants-Appellants at 13, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105. This duty of obedience is so

strong, in MOFCOM's view, that it forbids *any* inquiry into whether the representation is, in fact, correct. More important than the search for truth is the duty not to be "disrespectful" and not to incur the "displeasure" of the Chinese government. *See id.* at 2, 13.

This is asking too much. It is the duty of American courts to dispense justice according to law as best they can, not to cater to the *amour-propre* of foreign governments, much less to pretend that foreign governments will never attempt to use the American legal system strategically—and to refuse even to consider evidence to the contrary. American courts are already familiar, for example, with the phenomenon of "blocking statutes," whereby a foreign government attempts to protect its nationals by deliberately erecting a conflicting duty. *See* Restatement (Third) of Foreign Relations Law § 442 reporters' note 4 (1987) ("Blocking statutes are designed to take advantage of the foreign government compulsion defense . . . by prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities."). Accordingly, courts grant them a lower degree of deference. *See Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.29.

American courts should be similarly realistic in their approach to the declarations of foreign governments on other matters, including characterizations of foreign law. The traditional concern of comity analysis—infringement upon

the authority of the executive branch to conduct foreign relations—is not present in this case, given that the executive branch, in the person of the Solicitor General, has announced its opposition to the Second Circuit's standard of conclusive deference. *See* Brief for the United States as Amicus Curiae, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, 86 U.S.L.W. 3351 (2018) (No. 16-1220).

CONCLUSION

The rule of conclusive deference endorsed by the Second Circuit prevents courts from fulfilling their fundamental mission—to arrive at an accurate understanding of foreign law—and is not supported by considerations of deference to the executive branch in foreign affairs. Accordingly, *amici* respectfully urges that the judgment below be reversed.

Respectfully submitted,

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